No. 82-1700

In the Supreme Court of the United States

October Term, 1982

Ann Cash, T. Smith, C.S. Robinson, Wilson Webber, Charles Watson, G. Johnson, and David P. Henry ..... *Petitioners*

V.

City of Little Rock, Arkansas ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the denial by the Supreme Court of Arkansas of an attorney's fee for a conflict of interest in a taxpayers suit violates the requirements of due process.

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The respondent, City of Little Rock, Arkansas, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Supreme Court of Arkansas in this matter.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 277 Ark. 494, 644 S.W.2d 229 (1983), and is reproduced as Appendix A to the petition. The order denying rehearing and the opinion dissenting from the denial of rehearing are reported at 277 Ark. 494, 516, 644 S.W.2d 229, 239 (1983) and are reproduced as Appendix B to the petition.

JURISDICTION

The petitioners have adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The petitioners have adequately set forth the constitutional provision involved.

STATEMENT OF THE CASE

The respondent agrees with the petitioners's Statement of the Case with the exception of the last paragraph thereof, which is argument rather than fact summary. The respondent controverts the propositions set forth in such last paragraph.

REASONS FOR DENYING THE WRIT

This case is nothing, more or less, than a controversy about the petitioner David P. Henry's claim for an attorney's fee in a taxpayers suit in state court. The petitioners here open their argument with a candid admission that the abrogation of Mr. Henry's fee award by the Supreme Court of Arkansas does not present issues of such public importance or urgency as to warrant review by this Court. Agreed. However, the petitioners ask the Court to make an exception to rectify what they characterize as a gross injustice that is clear from the record. That there was any injustice, gross or otherwise, the respondent denies, but submits that the sanction imposed on Mr. Henry was not only proper but was about the only effective remedy that could have been designed to fit the situation.

The petitioners have stated that the Question Presented for Review in this case is "Whether the Arkansas Supreme Court's *sua sponte* denial of attorney's fees for supposed conflict of interest in a taxpayers' action violates the requirements of due process." The respondent has restated the Question Presented For Review as "Whether the denial by the Supreme Court of Arkansas for an attorney's fee for a conflict of interest in a taxpayers suit violates the requirements of due process." This change in stating the Question has been made because the respondent does not agree that the action of the Supreme Court of Arkansas was *sua sponte* and does not agree that the conflict of interest found by the Supreme Court of Arkansas was merely a *supposed* conflict.

The Code of Professional Responsibility of the American Bar Association has been adopted by the Supreme Court of Arkansas as the standard of professional conduct of attorneys at law. Rule 1 of the Rules of the Court Regulating Professional Conduct of Attorneys at Law, 3A Ark. Stat. Ann. (1979 Repl.) p. 528. Mr. Henry was chargeable with knowledge of that Code, and in particular

Canon 9 which enjoins attorneys to avoid even the appearance of impropriety, so he should be held to have been forewarned at the threshold that he was treading on shaky ground in undertaking the taxpayers suit against the City. Even if he had overlooked the strictures of the Code before filing the suit, he ought to have withdrawn from the matter forthwith when the City moved at the outset of the case for his disqualification, for he was thereby on express notice of the ethical impediment to his participation in the matter. Instead, he took his chances and lost. Now he comes beseeching this Court to reward him for his own bad judgment.

The petitioners contend that the City's attorney had advised Mr. Henry that his representation in *Phillips v. Weeks* would never be made the basis of any motion to disqualify him as counsel. It is true that Mr. Henry so testified, but one with his experience as an attorney for the City must have known that such a commitment would have been ineffectual, because even the governing body of the City, its board of directors, was devoid of authority to excuse Mr. Henry from obedience to the Code of Professional Responsibility. *Ahto v. Weaver*, 39 N.J. 418, 431, 189 A.2d 27, 34 (1963); Annot., 17 A.L.R. 3d 827. Moreover, it must be borne in mind that whether or not the City's attorney had attempted to waive any objection to Mr. Henry's dual representation, it was effectively withdrawn by the resolution of the City's board of directors pursuant to which the City's attorney moved for Mr. Henry's disqualification. In any event, no attempted waiver could have vitiated in the least the duty of the Supreme Court of Arkansas to enforce the dictates of the Code of Professional Responsibility.

Under part 1 of the petitioners' three-part Argument they contend that, in the absence of other facts, Mr. Henry's conduct might present a close question of dual representation, but that in this instance the substantial relationship test should be applied to negate any basis for disqualification because nothing in *Phillips v. Weeks* was

related to the taxpayers litigation. This contention, however, completely misses the mark. The substantial relationship test is strictly limited to determining whether an attorney may accept employment against a *former* client. The test is not applicable where both are existing clients, as in the case at bar. In this situation it is held that the substantial relationship test does not set a sufficiently high standard by which the necessity for disqualification should be determined. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2nd Cir. 1976). So, the cases cited by the petitioners under this heading are not gremane to the issue at hand.

Under part 2 of their Argument the petitioners, conceding that "not every injustice constitutes a due process violation" and not every due process violation is of sufficient import to warrant intervention by this Court, assert nevertheless that the decision of the Supreme Court of Arkansas has resulted in an unexpected outcome of great unfairness for which this Court should provide redress. The respondent disagrees with what the petitioners so blithely assume, i.e., (1) that there was any injustice or due process violation, and (2) that the result was unexpected. It is no injustice for a court to deny to a lawyer any reward for a breach of ethics, and this sanction can hardly be a violation of due process. It is naive to contend that the result was unexpected, because it is settled law that an attorney will be denied compensation for his services where he has acted with impropriety inconsistent with the character of the legal profession and in a manner incompatible with the faithful discharge of his professional responsibility. *Jeffry v. Pounds*, 136 Cal. Rpts. 373, 67 Cal. App.3d 6 (1977). See also, 7A C.J.S., Attorney and Client, §287c, pp 530-531. Although the City had sought a reduction instead of a denial of a fee to Mr. Henry, the Supreme Court correctly voided the entire award because to have done otherwise would have been to put its stamp of approval at least in some measure on Mr. Henry's improper conduct. The Supreme Court of Arkansas, having the inherent power and concomitant duty to regulate the Arkansas bar, must be left

free to enforce its rules and the standards set for attorneys practicing before it. Its sanctions for the violation of its ethical standards should not be disturbed in the absence of a flagrant abuse of its permissible discretion. See, *M. Richardson v. Hamilton Int'l. Corp.*, 469 F.2d 1382, (3rd Cir. 1972).

Part 3 of the petitioners' Argument again adverts to the minor importance of this case compared to other cases currently pending before this Court, but presses the Court to deviate from the usual criteria and afford Mr. Henry special treatment because a "grave injustice has occurred". On this point the petitioners have cited *Garner v. Louisiana*, 368 U.S. 157 (1961) and *Thompson v. City of Louisville*, 362 U.S. 199 (1960). See Petition at p. 11. The petitioners suggest that review was granted in these cases simply to correct unjust results, because the cases were, after all, of very minor public importance or urgency. That proposition is totally fallacious. The *Garner* case involved the constitutional right of blacks to sit peaceably at "white lunch counters" in places of public accommodation in Louisiana. The *Thompson* case involved the constitutionality of a city ordinance prohibiting loitering as applied to one waiting peaceably for a bus in a cafe without objection by the manager. These decisions came at a time when a major occupation of this Court was the definition and enforcement of the civil and individual rights of citizens under the Constitution. In the perspective of history the *Garner* and *Thompson* cases, though perhaps not landmarks, are in the vein of *Brown* and *Gideon* and *Mapp* and *Miranda*. It will not do to say that *Garner* and *Thompson* were not constitutionally significant. A *fortiori*, these cases are not precedents for the extraordinary relief the petitioners here are seeking.

CONCLUSION

It is not clear whether the petitioners are asserting a denial of substantive or procedural due process, or both, in this matter. In any case, Mr. Henry could hardly have a property right in a fee which would permit him to profit by a violation of the Code of Professional Responsibility, and it is mere quibbling for the petitioners to maintain that there was procedural unfairness in annulling Mr. Henry's fee award in toto. The City had contended for a reduction. The matter of a fee and the propriety of Mr. Henry's dual representation, were in issue, so Mr. Henry had ample notice and should have known the possible consequences when these issues came before the Supreme Court of Arkansas on appeal.

This case is not of the kind with which this Court should be concerned. Not only are the issues of slight public importance, but there is no great injustice crying for a remedy.

The relief prayed for by the petitioners should, therefore, be denied.

Respectfully submitted,

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